

BOARD OF APPEALS CASE NO. 067

BEFORE THE

APPLICANT: Stepney Road Holding Ltd.
Partnership

ZONING HEARING EXAMINER

REQUEST: Rezone 219.557 acres from GI,
General Industrial to R2, Urban Residential;
612 Stepney Road, Aberdeen

OF HARFORD COUNTY

HEARING DATE: April 17, 1996

Hearing Advertised

Aegis: 3/6/96 & 3/13/96

Record: 3/8/96 & 3/15/96

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Stepney Road Holding Ltd. Partnership, is requesting reclassification of 219.557 acres from GI, General Industrial, to R2, Urban Residential.

The subject parcel is located at 612 Stepney Road in the Second Election District. The parcel is identified as Parcel No. 59, in Grid 2-C, on Tax Map 58. The entire parcel contains 301.305 acres, all of which is zoned GI.

The first witness to testify was Mr. Thomas Brooks, Vice President of James F. Knott Development Corporation, which is the general partner of Stepney Road Holding Ltd. Partnership. Mr. Brooks said the Applicant is requesting that a portion of the subject parcel be reclassified from the GI classification to the R2 classification. Mr. Brooks testified that the Applicant purchased the subject property in 1987 and has marketed the property without success since that time. He said the Applicant signed a contract with KMS to buy the site; however, KMS terminated the contract because the property was not suitable for development. He also said Boston Properties expressed interest in the subject property but did not sign a contract to purchase it.

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Mr. Brooks said that shortly after the subject property was purchased, a wetlands delineation was performed (Applicant's Exhibit No. 8), which indicated that approximately 40 acres of wetland existed on the property. No further wetland delineation was performed until after the 1988 Comprehensive Rezoning. Mr. Brooks explained that the Applicant took no action to rezone the subject property during the comprehensive process because, at that time, based on available information, the subject property was suitable for development. Mr. Brooks said that, based on current wetland delineation, the parcel now contains approximately 70 acres of wetland.

Mr. Brooks said that zoning the subject property GI during the comprehensive was a mistake because it has become clear that there is no market for small-lot GI development which can be created on the property. He said that the nature and extent of the wetlands present on the site make large-lot development, which is marketable, impossible. He said only 45% of the site is marketable and that these facts were not known to the Applicant during the 1988 Comprehensive. Mr. Brooks stated that it is not feasible from an economic standpoint to pursue development of the subject property for any GI use.

Mr. Brooks went on to testify that if he had known of the difficulties in marketing the subject property with the GI classification, he would have requested a zoning change during the 1988 Comprehensive Rezoning. He said that the R2 classification is being requested so that residential units can be clustered around the extensive wetlands located on the site. He said that the R1 classification would not provide design flexibility necessary to cluster units.

Mr. Brooks said that he disagreed with the Department of Planning and Zoning's Staff Report, which indicated the only reason the subject property had not been sold was because the developer had not built the infrastructure necessary to create finished lots. Mr. Brooks explained that the economic projections for the site clearly indicate that even if the infrastructure was installed, the cost to do so would make development of the subject property unprofitable.

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Mr. Thomas O'Laughlin appeared and qualified as an expert in the field of site plan design. Mr. O'Laughlin said the first wetland delineation performed in 1988 showed 80% less wetlands than actually exist on the site and that the true state of the wetlands on the parcel was not known until the 1988 Comprehensive Rezoning was completed. He also said that in 1988, it was still common for approval to disturb wetlands, but that now it is virtually impossible to obtain such approvals. He said it could not be anticipated during the Comprehensive that in 1996 permitting agencies would be so strict in granting their approvals.

Mr. O'Laughlin explained that some of the lots shown on the concept plan could be combined into larger lots, but he pointed out that those larger lots would contain undevelopable areas due to the wetlands and would, therefore, not be desirable. Mr. O'Laughlin explained that the extent of the wetlands on the site severely impacts the Applicant's ability to develop the parcel with industrial uses.

Mr. Lee Cunningham was accepted as an expert traffic planner. Mr. Cunningham said that he performed a traffic analysis in connection with the Applicant's request. In his analysis, he conducted a field inspection and performed turning movement traffic counts from 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m. on a weekday at the intersection of MD Route 7 at MD Route 543, MD Route 7 at Stepney Road, MD Route 7 at U.S. Route 40, Stepney Road at Bush Chapel Road, and Stepney Road at Aldino-Stepney Road. He said he also determined background traffic from projects which have been approved but not yet built and then assigned the entire amount of traffic to the road system.

Mr. Cunningham testified that approximately 971 single-family detached dwelling units could be built on the subject property if rezoned R2. His analysis revealed that if those units were built on the site, the above mentioned intersections would operate at acceptable levels of service with some traffic signal timing changes. He explained that for the purpose of his analysis, he assumed that 1,577,500 square feet of space on Applicant's Exhibit No. 9 would be developed with light industrial uses, the highest type of industrial traffic generator, if the subject property were developed with its current GI zoning.

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The witness indicated that according to his analysis, the potential residential development generates approximately 28% fewer trips on a daily basis, 68% fewer trips during the morning peak hours, and 60% fewer trips during the evening peak hours than light industrial development. He said residential development would generate less objectionable truck traffic than would industrial development and, based on his analysis, Mr. Cunningham, said that zoning the subject property R2 would not cause objectionable traffic impact.

The next witness to testify on behalf of the Applicant was Bernard Page, who was accepted as an expert real estate appraiser. Mr. Page testified that he reviewed Applicant's Exhibit No. 9, determined the market value of the subject property, analyzed market activity from 1982 until the present and determined the marketability of the subject property while zoned G1.

Mr. Page pointed out that with the G1 classification, the subject property is presently proposed for 14 lots, and all but two are less than 10 acres in size. He said the subject property is severely impacted by wetlands and only 98.6 acres of the 219 gross acres are developable. Mr. Page indicated that a trend had developed prior to the 1988 Comprehensive which indicated a strong a market for small G1 lots. He went on to testify that after the Comprehensive was concluded, the trend reversed and that the sale of small G1 lots were less than half after the Comprehensive than it was before. He pointed out that this trend reversal could not have been known by the County Council during the comprehensive and that it would take 15 years to sell all of the G1 zoned lots if developed consistent with Applicant's Exhibit No. 9. He went on to testify that there are currently 150 acres of ready-to-go small G1 zoned lots available for sale in Harford County.

Mr. Page further indicated that based on his cash flow analysis, the cost to develop the subject property with G1 uses, the subject property has a negative present value of approximately \$616,000.00, and he concluded it was not feasible from an economic standpoint to develop the subject property for industrial uses.

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In conclusion, Mr. Page said he disagreed with the Department of Planning and Zoning Staff's contention that if the infrastructure necessary to develop the subject property with small lots was constructed, those lots would be marketable. He said no prudent businessman would spend the funds to construct the infrastructure when after doing so, development of the subject property would not yield a profit. Mr. Page's report was introduced as Applicant's Exhibit No. 14.

The final witness to testify on behalf of the Applicant was Denis Canavan, who was accepted as an expert in the field of land planning and zoning. Mr. Canavan testified that, based on his investigation and analysis and the evidence he heard at the hearing, it was his opinion that it was a mistake in the legal sense for the County Council to zone the subject property GI in the Comprehensive Rezoning. He said the testimony clearly shows that the proper analysis to determine the appropriateness of the GI zoning was not made by the Applicant or the Council at that time. He pointed out that it was unknown at that time that it would be difficult to obtain approval to disturb wetlands necessary to develop the subject property and, as a result, it was unknown that only small lots could be developed on the subject property. Moreover, a clear trend had developed between the 1982 and 1988 Comprehensive Rezonings indicating that small lots which could be developed on the subject property would be marketable. However, only after the comprehensive was complete did it become clear that this trend had reversed and that only large lots were marketable.

Mr. Canavan pointed out that the wetlands which actually exist on the site are 80% greater than anticipated during the comprehensive, which was another fact of which the Council could not have been aware. The witness noted that the property has remained undeveloped since the comprehensive and it was unreasonable to retain the subject property's GI classification. Mr. Canavan emphasized that the Council could not have been aware of these facts which made the GI zoning so unsuitable for the subject property. Mr. Canavan said it was his opinion that had the County Council been aware of these facts, it would not have zoned the subject property GI in the comprehensive rezoning.

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Mr. Canavan stated that the proposed R2 zoning would be appropriate and bears substantial relationship to the public safety, health and welfare and pointed out that other properties in the area are zoned R2, R3 and R1, including the BLC property, which was recently rezoned from GI to R3. Mr. Canavan did indicate that rezoning the subject property R2 would not be technically consistent with the industrial/commercial designation for the site as shown on the Master Land Use Plan; however, Mr. Canavan said the mere fact that the R2 zone would not be consistent with the Master Plan is no reason to deny the Applicant's request. He explained that the Master Plan is a guide only and zoning classifications can change such that they are inconsistent with the plan when conditions warrant and, further, that there are other areas classified industrial/commercial on the Master Plan which are already zoned R2.

No protestants appeared in opposition to the Applicant's request, and Mr. Anthony McClune, Chief of Current Planning for the Harford County Department of Planning and Zoning appeared and testified that the Staff concluded that no mistake in the legal sense was made in zoning the property GI during the comprehensive rezoning.

CONCLUSION:

In Maryland, a parcel of land cannot be rezoned simply because the property owner wants the property rezoned or even if the zoning authority feels the property should be rezoned. Before any property can be rezoned, there must be strong evidence of mistake in the zoning classification or a change in the character of the neighborhood since the last comprehensive rezoning. These principles and their corollaries were summarized in the case of Boyce v. Sembly, 25 Md. App. 43, 344 A.2d 137 (1975).

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A fair summary of the change-mistake rule is as follows:

1. The zoning classification assigned to a parcel of land as part of the last comprehensive rezoning is presumed to be correct.
2. A piecemeal zoning reclassification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.
3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive rezoning or that there has been a change in the character of the neighborhood of the subject property since the last comprehensive rezoning which justifies the piecemeal zoning classification.
4. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.
5. However, once an applicant established the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972). In the case of a denial where the applicant has met his burden of establishing a change in the character of the neighborhood or a mistake in the comprehensive zoning, the zoning authority must find facts, upon the evidence, which would support a denial. Messenger v. Board of County Commissioners for Prince George's County, 259 Md. 693, 271 A.2d 166 (1970). The factual determination of the zoning authority must be supported by substantial, competent and material evidence contained in the record. Not every potential problem will serve to validate a decision to deny a requested rezoning, the problems must be real and immediate, not future and imaginary. Furnace Branch Land Company v. Board of County Commissioners, 232 Md. 536, 194 A. 2d 640 (1963).

Therefore, there is a two-pronged test. The first question is whether there has been a change in the character of the neighborhood or a mistake in the zoning which would permit the rezoning. The second question is whether the requested rezoning should be granted.

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Once it has been shown that there was a change in the character of the neighborhood or a mistake in the comprehensive zoning which would support a rezoning to the requested classification, then the property should be rezoned unless there is evidence of some real and substantial harm to the public health, safety or welfare.

The Applicant presented uncontradicted and unrebutted evidence showing that at the time of the comprehensive:

- a. A clear trend showing demand for small lot GI uses had emerged.
- b. A wetlands study of the subject property indicated a relatively small amount of wetland which would impact development of the site.
- c. Variances to disturb wetlands to create larger lots on the subject property could still be obtained.
- d. There was no evidence to indicate that the subject property could not be developed for permitted GI uses.

However, after the comprehensive was completed:

- a. Actual wetlands were 80% more extensive than previously estimated.
- b. Variances to disturb wetlands to create larger lots could not be obtained.
- c. Only small lots could be created on the subject property.
- d. It was clear that there was very little demand for small lot GI uses.
- e. No portion of the subject property has been sold for a GI use and prospective purchasers have indicated that the subject property is unsuitable for development while zoned GI.
- f. The subject property has a negative \$616,000.00 value zoned GI.
- g. It would take approximately 15 years to sell all of the subject property in zoned GI.

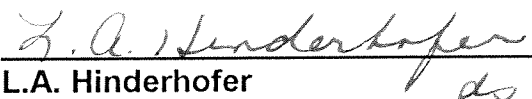
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The evidence indicates that none of these facts were known nor could they have been known by the County Council at the time of the comprehensive. As a result, the Applicant is left with property it cannot reasonably sell or develop and is unsuited for GI zoning.

There is no evidence to indicate that a denial of the rezoning would impact the public health, safety or welfare. On the contrary, the evidence shows that the public, safety and welfare would be preserved and promoted by rezoning the subject property R2. Mr. Cunningham indicated that traffic impact from the industrial uses permitted in the GI District on the subject property would far exceed that created by residential development. R2 zoning is necessary to develop the subject property around the extensive wetlands which exist on the property. Denis Canavan testified that zoning the subject property for residential development would be appropriate, given the location of nearby tracts, which are also zoned residential. He stated that rezoning the property residential bears a substantial relationship to the public health, safety and welfare.

Therefore, it is the finding of the Hearing Examiner that a mistake in the legal sense occurred in the last comprehensive rezoning. It is the recommendation of the Hearing Examiner that the subject parcel be rezoned from GI, General Industrial, to the R2, Urban Residential classification.

Date APRIL 29, 1996



L.A. Hinderhofer
Zoning Hearing Examiner